

Kevin T. Barnes, Esq. (#138477)
Gregg Lander, Esq. (#194018)
LAW OFFICES OF KEVIN T. BARNES
1635 Pontius Avenue, Second Floor
Los Angeles, CA 90025-3361
Tel.: (323) 549-9100 / Fax: (323) 549-0101
Email: Barnes@kbarnes.com

Joseph Tojarieh, Esq. (#265492)
TOJARIEH LAW FIRM, PC
10250 Constellation Boulevard, Suite 100
Los Angeles, CA 90067
Tel: (310) 553-5533 / Fax: (310) 553-5536
Email: JFT@tojarielaw.com

Attorneys for Plaintiff JANE DOE

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

JANE DOE,) Case No. 2:18-cv-09530 SVW (GJSx)

Plaintiff,

V.

UNIVERSITY OF SOUTHERN
CALIFORNIA, a California
Corporation, BOARD OF
TRUSTEES OF THE UNIVERSITY
OF SOUTHERN CALIFORNIA, an
entity, form unknown; and GEORGE
TYNDALL, M.D., an individual, and
DOES 1 to 100, inclusive;

Defendants.

Case No. 2:18-cv-09530 SVW (GJSx)

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS UNIVERSITY OF
SOUTHERN CALIFORNIA'S AND
THE BOARD OF TRUSTEES OF
THE UNIVERSITY OF SOUTHERN
CALIFORNIA'S MOTION TO
DISMISS FOR FAILURE TO
STATE A CLAIM PURSUANT TO
F.R.C.P. 12(b)(6), AND TO STRIKE
PUNITIVE DAMAGES CLAIMS
PER F.R.C.P. 12(f)**

Date: April 8, 2019

Time: 1:30 p.m.

Dept.: Courtroom 10A

Honorable Stephen V. Wilson
Courtroom 10A

Action filed: November 9, 2018
Trial Date: None set

111

111

111

Table of Contents

Page

I.	INTRODUCTION	1
II.	RELEVANT FACTS	1
III.	STANDARDS	5
A.	Motion to Dismiss	5
B.	Motion to Strike.....	6
IV.	ANALYSIS	6
A.	Ms. Doe's FAC is not barred by any statute of limitations.	6
1.	<i>Ms. Doe discovered her claims in 2018.....</i>	7
2.	<i>Defendant fraudulently concealed Ms. Doe's claims.</i>	9
B.	Plaintiff's inclusion of claims under Civil Code sections 51.9 and 52.4 was inadvertent.	13
C.	The FAC alleges ample facts to support Ms. Doe's claims against the USC Defendants.	13
1.	<i>The FAC repeatedly alleges the USC Defendants' advance knowledge of Dr. Tyndall's misconduct.</i>	13
2.	<i>Title IX: The FAC sufficiently alleges facts supporting actual notice and deliberate indifference.</i>	14
3.	<i>Bane Act: The FAC sufficiently alleges facts that Defendants interfered with Ms. Doe's rights through threat, intimidation, or coercion.</i>	15
4.	<i>Constructive Fraud: The FAC sufficiently alleges that Defendants had notice and intent to deceive.</i>	16
5.	<i>Negligence: Ms. Doe's negligence claims are all supported by sufficient facts.....</i>	17
6.	<i>Intentional Infliction of Emotional Distress:</i> <i>The FAC sufficiently alleges a claim for IIED.</i>	17

1 **TABLE OF CONTENTS - Continued**

	<u>Page</u>
7. <i>UCL: The FAC sufficiently alleges a claim for unfair competition under Business & Professions Code section 17200, et seq.</i>	18
D. Ms. Doe's claim for punitive damages is valid.	18
E. Should the Court find any merit to Defendants' Motion, Ms. Doe should be freely granted leave to amend.	20
V. CONCLUSION	20

Table of Authorities

	<u>Page</u>
Cases	
<i>Amen v. Merced County Title Co.</i> 58 Cal.2d 528 (1962)	10
<i>Andrews Farms v. Calcot, Ltd.</i> , 693 F.Supp.2d 1154 (E.D. Cal. 2010)	16
<i>April Enterprises, Inc. v. KTTV</i> , 147 Cal.App.3d 805(1983)	7
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	6
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	6
<i>Burrows v. Redbud Cnty. Hosp. Dist.</i> , 188 F.R.D. 356 (N.D. Cal. 1997)	19
<i>Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.</i> , 637 F.3d 1047 (9th Cir. 2011)	13
<i>Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.</i> , 20 Cal.4th 163 (1999).....	18
<i>Cooper v. Pickett</i> , 137 F.3d 616 (9th Cir.1997)	12
<i>Eminence Capital, LLC v. Aspeon, Inc.</i> , 316 F.3d 1048 (9th Cir.2003)	20
<i>Erie Railroad Co. v. Tompkins</i> , 304 U.S. 64 (1938).....	19
<i>Estate of Prasad ex rel. Prasad v. County of Sutter</i> , 958 F.Supp.2d 1101 (E.D. Cal. 2013)	19, 20
<i>Fantasy, Inc. v. Fogerty</i> , 984 F.2d 1524 (9th Cir.1993)	6
<i>Fogerty v. Fantasy, Inc.</i> , 510 U.S. 517 (1994).....	6
<i>Fox v. Ethicon Endo-Surgery, Inc.</i> , 35 Cal.4th 797 (2005).....	6, 7, 8, 9
<i>Gafcon, Inc. v. Ponsor & Associates</i> , 98 Cal.App.4th 1388 (2002)	18
<i>Gillespie v. Civiletti</i> , 629 F.2d 637 (9th Cir. 1980)	17

Table of Authorities - Continued**Page****Cases - Continued**

<i>Hanna v. Plumer,</i> 380 U.S. 460 (1965).....	19
<i>In Re GlenFed, Inc. Securities Litigation,</i> 42 F.3d 1541 (9th Cir.1994)	12
<i>Jackson v. E. Bay Hosp.,</i> 980 F. Supp. 1341 (N.D. Cal. 1997).....	19
<i>Jolly v. Eli Lilly & Co.</i> 44 Cal.3d 1103 (1988)	8
<i>Kahle v. Gonzales,</i> 474 F.3d 665 (9th Cir. 2007)	6
<i>Ladd v. County of San Mateo,</i> 12 Cal. 4th 913 (1996)	17
<i>LeDuc v. Ky. Cent. Life Ins. Co.,</i> 814 F.Supp. 820 (N.D.Cal.1992).....	6
<i>Lightner Mining Co. v. C.D. Lane</i> 161 Cal. 689 (1911)	10, 11
<i>Marksman Partners, L.P. v. Chantal Pharm. Corp.,</i> 927 F.Supp. 1297 (C.D.Cal.1996)	12
<i>McCue v. S. Fork Union Elem. Sch.,</i> 766 F. Supp. 2d 1003 (E.D. Cal. 2011)	15
<i>Migliori v. Boeing North American, Inc.,</i> 114 F.Supp.2d 976 (C.D. Cal. 2000)	13
<i>Morrison v. Pal,</i> No. 117CV00776AWIJLT, 2018 WL 6460038 (E.D. Cal. Dec. 10, 2018)	16
<i>Neel v. Magana, Olney, Levy, Cathcart & Gelfand</i> 6 Cal.3d 176 (1971)	10
<i>Neveu v. City of Fresno,</i> 392 F. Supp. 2d 1159 (E.D. Cal. 2005)	19
<i>Norgart v. Upjohn Co.,</i> 21 Cal.4th 383 (1999)	6, 7
<i>Oden v. Northern Marianas College,</i> 440 F.3d 1085 (9th Cir. 2006)	14
<i>Ovando v. County of Los Angeles,</i> 159 Cal.App.4th 42 (2008)	7

Table of Authorities - Continued

<u>Cases - Continued</u>	
<i>Park v. Travelers Commercial Ins. Co.,</i> No. CV1401919RGKAGRX, 2014 WL 12597084 (C.D. Cal., Apr. 21, 2014)	18
<i>Parsons v. Tickner,</i> 31 Cal.App.4th 1513 (1995)	7
<i>Pashley v. Pacific Electric Railway Co.</i> 25 Cal.2d 226 (1944)	7, 9, 10, 11
<i>Rutherford v. Rideout Bank</i> 11 Cal.2d 479 (1938)	11
<i>Scalia v. County of Kern,</i> 308 F.Supp.3d 1064 (E.D. Cal. 2018)	19
<i>Stafford v. Shultz</i> 42 Cal.2d 767 (1954)	10
<i>Stanwood v. Mary Kay, Inc.,</i> 941 F. Supp. 2d 1212 (C.D. Cal. 2012)	17
<i>Swartz v. KPMG LLP,</i> 476 F.3d 756 (9th Cir. 2007)	6
<i>Ward v. Westinghouse Canada, Inc.,</i> 32 F.3d 1405 (9th Cir.1994)	7
<i>Whittlestone, Inc. v. Handi-Craft Co.,</i> 618 F.3d 970 (9th Cir. 2010)	18
<i>Wohlgemuth v. Meyer</i> 139 Cal.App.2d 326 (1956)	10
<i>Younan v. Equifax Inc.,</i> 111 Cal.App.3d 498 (1980)	16
<i>Zamora v. Sacramento Rendering Co.,</i> No. Civ. S-05-00789 DFL KJM, 2007 WL 137239 (E.D. Cal. 2007)	15

Statutes/Rules

25	California Business & Professions Code § 17200.....	18
26	California Civil Code § 51.9	13
27	California Civil Code § 52.4	13, 15
28	California Code of Civil Procedure § 425.13	19, 20

1 **Table of Authorities - Continued**

2 **Page**

3 **Statutes/Rules - Continued**

4 Federal Rules of Civil Procedure § 8.....	20
5 Federal Rules of Civil Procedure § 9.....	12, 13
6 Federal Rules of Civil Procedure § 12.....	6, 18, 19
7 Federal Rules of Civil Procedure § 15.....	20

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

2 **I. INTRODUCTION**

3 Defendants University of Southern California ("USC") and USC's Board of
 4 Trustees (individually, the "Board," and with USC, collectively, "Defendants")
 5 hired a predatory physician, Dr. George Tyndall ("Dr. Tyndall"), as its sole, full-
 6 time gynecologist at the student health center. Plaintiff Jane Doe ("Ms. Doe") was
 7 assaulted by Dr. Tyndall in 1991. For decades, Defendants concealed Dr. Tyndall's
 8 pervasive sexual abuse and harassment of female patients, allowing him access to
 9 prey on USC's young female student population.

10 When Dr. Tyndall's pervasive abuse finally came to light in a 2018
 11 newspaper article, Ms. Doe realized she had been betrayed by the very institution
 12 that she once had much pride in, and the horrific reality of Dr. Tyndall's "medical
 13 care" set in. Thereafter, Ms. Doe brought this action, alleging claims against USC,
 14 the Board, and Dr. Tyndall.

15 Defendants now bring a Motion to Dismiss to prevent Ms. Doe from having
 16 her day in court. The Motion asserts two main arguments. First, Defendants argue
 17 that Ms. Doe's claims are barred by the statute of limitations. However, this
 18 argument is meritless, as Defendants' reprehensible conduct in actively hiding Dr.
 19 Tyndall's misconduct estops Defendants from benefitting from such concealment.
 20 Second, Defendants argue that Ms. Doe has not alleged that Defendants had notice
 21 of Dr. Tyndall's abuse. To the contrary, Ms. Doe's Complaint repeatedly alleges
 22 Defendants' knowledge, and for several claims, no actual knowledge is required.

23 Defendants also seek to strike Ms. Doe's claim for punitive damages on the
 24 ground that Ms. Doe cannot pray for punitive damages without prior court order.
 25 This argument is unsupported by the weight of authority on this issue.

26 Accordingly, Defendants' motion must be denied. However, if the Court is
 27 inclined to grant any part of Defendants' motion, Ms. Doe should be freely granted
 28 leave to amend the Complaint.

1 **II. RELEVANT FACTS**

2 USC hired Dr. Tyndall in 1989 to work at its Student Health Center as the
 3 sole full-time gynecologist. Ms. Doe's First Amended Complaint, Dkt No. 38
 4 [“FAC”] ¶ 9. Over the span of three decades, or about sixty school semesters, Dr.
 5 Tyndall treated tens of thousands of female students, many of them teenagers
 6 seeing a gynecologist for the first time. FAC ¶ 9.

7 Few, if any, of the young women who lay down on Dr. Tyndall's exam table
 8 at the Student Health Center knew that he had been accused repeatedly of
 9 misconduct. FAC ¶ 9. Such allegations included claims that, while he worked, Dr.
 10 Tyndall would make unseemly comments, such as describing patients' skin as
 11 “flawless,” “creamy” or “beautiful,” according to multiple witnesses. FAC ¶ 14.
 12 He remarked on students' “perky breasts.” “They stand right up there, don't they?”
 13 he once said. FAC ¶ 14. The allegations continued that, during some exams, Dr.
 14 Tyndall made explicit references to sexual intercourse while his fingers were inside
 15 patients; for example, he would tell young ladies with their hymens intact, “Don't
 16 worry about it, your boyfriend's gonna love it.” FAC ¶ 20.

17 Ms. Doe attended USC from approximately 1990 to 1993. FAC ¶ 1. As the
 18 FAC alleges, during the second semester of her freshman year at USC, in or about
 19 March of 1991, Ms. Doe was subjected to medical examination by Dr. Tyndall one
 20 time. FAC ¶ 4. Ms. Doe had a confidential, privileged, and/or fiduciary
 21 relationship with Defendants, and placed her trust in them. FAC ¶ 58.

22 During his medical examination of Ms. Doe, Dr. Tyndall molested, sexually
 23 abused, and sexually harassed her, by, among other things, performing an
 24 unnecessarily aggressive inspection of Ms. Doe's private parts. FAC ¶ 5. During
 25 the exam, Dr. Tyndall felt her breasts, put his fingers inside her vagina and anus,
 26 and aggressively moved his fingers and a speculum around inside of her. Dr.
 27 Tyndall also made grossly inappropriate remarks at the time. FAC ¶ 5. For
 28 example, when Ms. Doe told Dr. Tyndall that she was having difficulty finding the

1 string of her tampon, he remarked “You are such an idiot - don’t you know it’s not
2 a black hole? Haven’t you had sex before?” and words to that effect. FAC ¶ 6.

3 Dr. Tyndall misrepresented that his conduct was for a legitimate medical
4 purpose and/or conformed to accepted medical practice. FAC ¶ 55. However, all
5 Defendants knew that Dr. Tyndall’s examinations were not in fact proper,
6 appropriate, legitimate, and/or considered within standard of care by any physician
7 of any specialty, including gynecology or obstetrics. FAC ¶ 56. Defendants had
8 extensive and detailed knowledge of Dr. Tyndall’s history of pervasive and violent
9 misconduct, yet affirmatively concealed Dr. Tyndall’s propensity to sexually abuse
10 female patients and his past sexual abuse. FAC ¶ 56. Defendants took no action
11 regarding prior complaints against Dr. Tyndall and continued to allow him to treat
12 female patients despite knowledge of his misconduct and unsuitability. FAC ¶ 56.

13 Defendants misrepresented Dr. Tyndall’s suitability and further
14 implemented various measures to conceal Dr. Tyndall’s actions, including
15 permitting him to remain in a position of authority and trust, scheduling patients
16 for gynecological examinations with him, granting him unfettered and
17 unsupervised access to patients, holding him out as a trustworthy physician, and
18 failing to disclose his prior misconduct to patients. FAC ¶ 57. Defendants intended
19 that Ms. Doe and Dr. Tyndall’s other patients act on the concealment and
20 misrepresentations by seeking treatment and not report Dr. Tyndall’s conduct, and
21 Ms. Doe and other patients did so rely on the concealment and misrepresentations.
22 FAC ¶ 57.

23 For over two decades, USC concealed Dr. Tyndall’s sexual abuse. In 2013,
24 eight chaperones reported concerns about Dr. Tyndall to their supervisor, nurse
25 Cindy Gilbert. FAC ¶ 15. Nurse Gilbert went to then-Executive Director Dr.
26 Lawrence Neinstein, and the head of clinic nursing, Tammie Akiyoshi. These
27 complaints were referred to USC’s Office of Equity and Diversity, which
28 investigates sexual misconduct and racial and gender discrimination. FAC ¶ 15.

1 According to USC (though multiple chaperones who had complained were never
 2 informed of the probe or questioned by the investigator), the investigation
 3 concluded there was no violation of school policy, and the only action Dr.
 4 Neinstein took as a result of the investigation was barring Dr. Tyndall from locking
 5 the door of his office while with patients. FAC ¶ 16.

6 From 2014 to 2016, Nurse Gilbert repeatedly went to Tammie Akiyoshi, Dr.
 7 Neinstein, and other clinic administrators, who seemed uninterested. Dr. Tyndall
 8 continued seeing as many as 16 patients a day. FAC ¶ 27. In June 2016, Nurse
 9 Gilbert went to USC's rape crisis center and spoke to Executive Director Ekta
 10 Kumar, a psychologist, who seemed astonished and used the word "abuse" in
 11 response to her description of Dr. Tyndall's conduct, promising to take the matter
 12 higher at USC. FAC ¶ 28. Also in June 2016, Nurse Gilbert and other staffers
 13 stumbled upon a box in a cabinet in Dr. Tyndall's office containing images of
 14 student-patients' genitals. FAC ¶ 29. The slides and photographs were shot in the
 15 old health clinic in 1990 and 1991 and some were labeled with identifying patient
 16 information. A senior clinic administrator confiscated the box. FAC ¶ 29.

17 Even so, Dr. Tyndall continued to receive his salary from USC. Then, in a
 18 secret deal in the summer of 2017, top USC administrators allowed Dr. Tyndall to
 19 resign quietly with a financial payout. FAC ¶ 30. The terms of the deal included
 20 the offer that if Dr. Tyndall would agree to resign, he would be given a severance,
 21 and the conclusion of the USC investigation would be changed to "no finding."
 22 FAC ¶ 30. Dr. Tyndall's resignation was effective June 30, 2017. USC did not
 23 inform Dr. Tyndall's patients. FAC ¶ 31. An October communication advised that
 24 Dr. Tyndall was "no longer with the University of Southern California." FAC ¶ 31.

25 In 2018, Ms. Doe read a news article in the Los Angeles Times about USC,
 26 The Board, and Dr. Tyndall that brought forth the realization that she had been
 27 betrayed and violated by the very institution that she once had much pride in, and
 28 the horrific reality of Dr. Tyndall's "medical care" set in. FAC ¶ 7. In January

1 2018, Dr. Tyndall renewed his California medical license, and has been quoted as
 2 saying that he intends to work well into his eighties. FAC ¶ 33.

3 On November 9, 2018, Ms. Doe filed her complaint with these allegations.
 4 The FAC was filed and served on February 27, 2019. The FAC asserts 16 causes of
 5 action: (1) Violation of Title IX; (2) Unruh Act Violation (Civil Code § 51); (3)
 6 Sexual Harassment (Civil Code § 51.9); (4) Bane Act Violation (Civil Code §
 7 52.1); (5) Gender Violence (Civil Code § 52.4); (6) Sexual Assault; (7) Sexual
 8 Battery (Civil Code § 1708.5); (8) Constructive Fraud (Civil Code § 1573); (9)
 9 Violation of Cal. Ed. Code § 66270; (10) Negligence; (11) Negligence Per Se; (12)
 10 Negligent Hiring, Supervision and Retention; (13) Negligent Failure to Warn; (14)
 11 Intentional Infliction of Emotional Distress (IIED); (15) Negligent Infliction of
 12 Emotional Distress (NIED); and (16) Unfair Business Practices (Cal. Bus. & Prof.
 13 Code § 17200). Causes of action 5-7 are not asserted against Defendants.

14 On March 8, 2019, Defendants moved for an order dismissing the FAC as
 15 against them under Federal Rules of Civil Procedure, Rule 12(b)(6), and striking
 16 punitive damages under Rule 12(f). As set forth in detail below, Ms. Doe zealously
 17 opposes Defendants' motion. Further, even if the Court finds merit in Defendants'
 18 arguments, Ms. Doe should be allowed an opportunity to further amend her
 19 complaint to allege those facts that the Court may find lacking.

20 III. STANDARDS

21 A. Motion to Dismiss

22 Rule 12(b)(6) (failure to state a claim) provides that a complaint must allege
 23 facts sufficient to "raise a right to relief above the speculative level." *Bell Atlantic*
 24 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The plaintiff must plead affirmative
 25 factual content that "allows the court to draw the reasonable inference that the
 26 defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662
 27 (2009). "In ruling on a 12(b)(6) motion, a court may generally consider only
 28 allegations contained in the pleadings, exhibits attached to the complaint, and

1 matters properly subject to judicial notice.” *Swartz v. KPMG LLP*, 476 F.3d 756,
 2 763 (9th Cir. 2007). In considering a motion to dismiss, this court accepts all of the
 3 allegations in the complaint as true and construes them in the light most favorable
 4 to the plaintiff. *Kahle v. Gonzales*, 474 F.3d 665, 667 (9th Cir. 2007).

5 **B. Motion to Strike**

6 Rule 12(f) allows a party to move to strike from a pleading “any redundant,
 7 immaterial, impertinent, or scandalous matter.” Fed.R.Civ.P. 12(f). A matter is
 8 “immaterial” if it has no bearing on the claims and defenses pleaded. *Fantasy,*
 9 *Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir.1993), rev'd on other grounds in
 10 *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534–35 (1994). Thus, “[m]otions to strike
 11 are generally not granted unless it is clear that the matter to be stricken could
 12 have no possible bearing on the subject matter of the litigation.” *LeDuc v. Ky.*
 13 *Cent. Life Ins. Co.*, 814 F.Supp. 820, 830 (N.D.Cal.1992).

14 **IV. ANALYSIS**

15 **A. Ms. Doe's FAC is not barred by any statute of limitations.**

16 A statute of limitations period begins to run when the cause of action
 17 accrues. *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal.4th 797, 806 (2005). Generally,
 18 a cause of action accrues at “the time when the cause of action is complete with all
 19 of its elements.” *Id.*, citing *Norgart v. Upjohn Co.*, 21 Cal.4th 383, 397 (1999)
 20 (internal quotations omitted). “An important exception to this general rule is the
 21 discovery rule which “postpones accrual of a cause of action until the plaintiff
 22 discovers, or has reason to discover, the cause of action.” *Fox*, 35 Cal.4th at 807
 23 (citing *Norgart*, 21 Cal.4th at 397). Similarly, a party’s fraudulent concealment of
 24 facts giving rise to a cause of action will toll the statute of limitations until the facts
 25 are discovered by the plaintiff. *Pashley v. Pacific Electric Railway Co.*, 25 Cal.2d
 26 226, 229-30 (1944). Because both the discovery rule and tolling for fraudulent
 27 concealment apply here, Ms. Doe’s claims are timely, regardless of which statute
 28 of limitations applies.

1 **1. Ms. Doe discovered her claims in 2018.**

2 Under the discovery rule, “[a] plaintiff has reason to discover a cause of
 3 action when he or she has reason at least to suspect a factual basis for its
 4 elements.” *Fox*, 35 Cal.4th at 807 (citing *Norgart*, 21 Cal.4th at 397). “Under the
 5 discovery rule, suspicion of one or more of the elements of a cause of action,
 6 coupled with knowledge of any remaining elements, will generally trigger the
 7 statute of limitations period. *Id.*

8 The discovery rule “protects those who are ignorant of their cause of action
 9 through no fault of their own. It permits delayed accrual until a plaintiff knew or
 10 should have known of the wrongful conduct at issue.” *April Enterprises, Inc. v.*
 11 *KKTV*, 147 Cal.App.3d 805, 832 (1983); *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103,
 12 1112 (1988) (“When a plaintiff reasonably should have discovered facts for
 13 purposes of the accrual of a cause of action or application of the delayed discovery
 14 rule is generally a question of fact, properly decided as a matter of law only if the
 15 evidence … can support only one reasonable conclusion.”) “[T]he question when a
 16 plaintiff actually discovered or reasonably should have discovered the facts for
 17 purposes of the delayed discovery rule is a question of fact unless the evidence can
 18 support only one reasonable conclusion.” *Ovando v. County of Los Angeles*, 159
 19 Cal.App.4th 42, 61 (2008); see also *Ward v. Westinghouse Canada, Inc.*, 32 F.3d
 20 1405, 1408 (9th Cir.1994) (“Under California law, the question of when [the
 21 plaintiff] was on inquiry notice of potential wrongdoing is a factual question.”);
 22 *Parsons v. Tickner*, 31 Cal.App.4th 1513, 1526 (1995) (noting that delayed
 23 discovery rule applies in two situations: (1) where it would be difficult for a
 24 plaintiff to understand the breach or the resulting injuries; and (2) where the parties
 25 have a confidential or fiduciary relationship).

26 The accrual of a cause of action in relation to the discovery rule is typically
 27 a question of fact. *Fox*, 35 Cal.4th at 810. “A plaintiff whose complaint shows on
 28 its face that his [or her] claim would be barred without the benefit of the discovery

rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.” *Id.* at 808. The court must take as true such allegations regarding delayed discovery, as well as whether any defect in pleading could be cured. *Id.* at 811.

Here, Ms. Doe did not discover her injuries until long after the wrongful acts occurred. FAC ¶ 7. Ms. Doe was not put on notice of her civil claims against Defendants by what occurred during her examination. At no point did anyone advise her that Dr. Tyndall’s conduct was not medically appropriate or necessary. FAC ¶¶ 8, 56. At no point during or after her examination did Defendants or anyone else advise her of Dr. Tyndall’s prior violent sexual mistreatment of other female patients. FAC ¶¶ 8, 56. Ms. Doe did not discover or suspect a factual basis for her claims until 2018, when she read a news article entitled “A USC doctor was accused of bad behavior with young women for years. The University let him continue treating students,” by Harriet Ryan, Matt Hamilton, and Paul Pringle, which was published on May 16, 2018, in The Los Angeles Times. FAC ¶ 7.

The nature of Ms. Doe’s injuries and subsequent damages, and their causal relationship to Defendants’ treatment of Ms. Doe, were not and could not have been discovered through reasonable care and diligence. FAC ¶ 58. Ms. Doe only became aware that Defendants’ mistreatment constituted sexual battery, harassment, and assault, and/or gender-based violence in 2018, when she learned that her experience was not unique, and that other female patients of Dr. Tyndall had complained of his sex-based violence and misconduct. Until then, she did not have “a reason to at least suspect a factual basis” for her claims and did not have “information of circumstances to put her on inquiry” or an opportunity to obtain knowledge from sources open to her investigation, and could not have “made early discovery despite reasonable diligence.” *Fox*, 35 Cal.4th at 807-08. Ms. Doe sufficiently sets forth facts regarding the time and manner of her discovery, as well as the inability to have made earlier discovery despite reasonable diligence.

1 **2. Defendant fraudulently concealed Ms. Doe's claims.**

2 “[T]he defendant, having by fraud or deceit concealed material facts and by
 3 misrepresentations hindered the plaintiff from bringing an action within the
 4 statutory period, is estopped from taking advantage of his own wrong.” *Pashley*,
 5 25 Cal.2d at 231. “Otherwise, in such cases, the defendant, by concealing
 6 his fraud, would effectively block recovery by the plaintiff because of the
 7 intervention of the statute of limitations.” *Id.* at 232.

8 “The same conclusion governs when the defendant under duty of disclosure
 9 has concealed known essential facts upon which to base a recovery against him
 10 and thereby has hindered the plaintiff from bringing his action until after the
 11 statute would otherwise have terminated the period of limitation... Whether in
 12 itself it is an actionable fraud or merely suffices to toll the statute on the original
 13 obligation, the breach of a duty to disclose known facts with the intention to and
 14 which does hinder commencement of an action until the action would be
 15 outlawed, is a fraud practiced upon the plaintiff which in conscience estops the
 16 defendant’s reliance on the statute of limitations.” *Pashley*, 25 Cal.2d at 232.

17 A doctor has such a duty of disclosure to patients. *Pashley*, 25 Cal.2d at
 18 235-36 (holding that doctors’ failure to make full disclosure of plaintiff’s injuries
 19 “excused his failure to seek knowledge from independent sources and his delay in
 20 commencing the action”); *Stafford v. Shultz*, 42 Cal.2d 767, 775-79 (1954)
 21 (holding complaint alleged sufficient facts to toll statute of limitations based on
 22 doctors’ fraudulent misrepresentations and concealment). “The doctor-patient
 23 relationship is a fiduciary one and it is incumbent on the doctor to reveal all
 24 pertinent information to his patient. The same is true of the hospital-patient
 25 relationship. Withholding information would in a sense amount to
 26 misrepresentation.” *Wohlgemuth v. Meyer*, 139 Cal.App.2d 326, 331 (1956).
 27 “[T]he disclosure must be full and complete, and any material concealment or
 28 misrepresentation will amount to fraud sufficient to entitle the party injured

1 thereby to an action.” *Pashley*, 25 Cal.2d at 235.

2 “Cases in which the defendant stands in a fiduciary relationship to the
 3 plaintiff are frequently treated as if they involved fraudulent concealment of the
 4 cause of action by the defendant. The theory is that although the defendant makes
 5 no active misrepresentation, this element is supplied by an affirmative obligation
 6 to make full disclosure, and the non-disclosure itself is fraud.” *Amen v. Merced*
 7 *County Title Co.*, 58 Cal.2d 528, 534 (1962) (citations and internal quotation
 8 marks omitted). This “prevents the fiduciary from obtaining immunity for an
 9 initial breach of duty by a subsequent breach of the obligation of disclosure.” *Neel*
 10 *v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal.3d 176, 189 (1971).

11 Importantly, a doctor’s non-disclosure or misrepresentation of facts to a
 12 patient is imputed to the doctor’s employer/principal. *Pashley*, 25 Cal.2d at 235-
 13 36 (holding false statements made to patient by defendant’s employed physicians
 14 were imputed to defendant to defeat statute of limitations defense) (citing *Lightner*
 15 *Mining Co. v. C.D. Lane*, 161 Cal. 689, 703 (1911) [“The fraud of the agents will
 16 be imputed to the principal for the purpose of preventing the running of the statute
 17 of limitations whether the principal was aware of it or not”]).

18 “The injustice of allowing such fraud to become successful by reason of
 19 lapse of time and concealment is an injustice to the plaintiff, and it is precisely the
 20 same in effect and extent whether the fraud is that of the defendant or its agents.”
 21 *Pashley*, 25 Cal.2d at 236. “The principal, having received the benefits of his
 22 agents’ fraud, has no equity in his favor.” *Lightner Mining Co.*, 161 Cal. at 703;
 23 *see also Rutherford v. Rideout Bank*, 11 Cal.2d 479, 483-84 (1938) (principal who
 24 puts agent in position to commit fraud upon third person is subject to liability for
 25 the fraud, even if agent acted solely for own purposes, principal is entirely
 26 innocent, and principal received no benefit from the transaction).

27 Here, Ms. Doe has properly alleged that all Defendants knew that Dr.
 28 Tyndall’s examinations were not proper, appropriate, legitimate, and/or considered

1 within standard of care by any physician of any specialty, including gynecology or
 2 obstetrics. FAC ¶ 56. Significantly, although Defendants repeatedly assert in their
 3 motion that Ms. Doe has not alleged that they were on notice of Dr. Tyndall's prior
 4 misconduct before Ms. Doe's exam, this is simply not true. As addressed in full,
 5 *infra*, Ms. Doe repeatedly alleged that Defendants had knowledge of Dr. Tyndall's
 6 unsuitability at all relevant times. E.g., FAC ¶¶ 56, 180, 185, 186.

7 Despite their knowledge, Defendants affirmatively concealed Dr. Tyndall's
 8 propensity to sexually abuse female patients and his past sexual abuse. Defendants
 9 misrepresented Dr. Tyndall's suitability and further implemented various measures
 10 to conceal Tyndall's actions, including permitting him to remain in a position of
 11 authority and trust, scheduling patients for gynecological examinations with him,
 12 granting him unfettered and unsupervised access to patients, holding him out as a
 13 trustworthy physician, and failing to disclose his prior misconduct to patients. FAC
 14 ¶ 57. In concealing the misconduct, Defendants intended that Ms. Doe and other
 15 patients rely on the concealment by seeking treatment and not reporting Dr.
 16 Tyndall's conduct, and Ms. Doe and the other patients did so rely on the
 17 concealment and misrepresentations. FAC ¶ 57.

18 Defendants' reliance on *Mark K. v. Roman Catholic Archbishop*, 67
 19 Cal.App.4th 603, 613 (1998), is misplaced. There, the court found that there was
 20 "no allegation ...that the church concealed the fact of plaintiff's underlying injury."
 21 *Id.* Here, in contrast, Ms. Doe alleges that Defendants' actions included
 22 concealment of the impropriety of Dr. Tyndall's examination, i.e., that Defendants
 23 concealed the fact of Ms. Doe's underlying injury. Accordingly, *Mark K.* does not
 24 help Defendants.

25 Defendants also argue that Ms. Doe failed to set forth the fraudulent
 26 concealment allegations with sufficient particularity. Under Fed.R.Civ.P. 9(b), "a
 27 plaintiff must include statements regarding the time, place, and nature of the
 28 alleged fraudulent activities. ... In certain cases, to be sure, the requisite

1 particularity might be supplied with great simplicity.” *In Re GlenFed, Inc.*
 2 *Securities Litigation*, 42 F.3d 1541, 1547–1548 (9th Cir.1994) (en banc),
 3 superseded by statute on other grounds as stated in *Marksman Partners, L.P. v.*
 4 *Chantal Pharm. Corp.*, 927 F.Supp. 1297 (C.D.Cal.1996); *see Cooper v. Pickett*,
 5 137 F.3d 616, 627 (9th Cir.1997) (“fraud allegations must be accompanied by ‘the
 6 who, what, when, where, and how’ of the misconduct charged”).

7 Ms. Doe sufficiently pleads the time, place, and nature of Defendants’
 8 concealment. Ms. Doe repeatedly alleges that, for over 25 years, Defendants knew
 9 of Dr. Tyndall’s sexual assaults on his patients. E.g., FAC ¶ 56, 142. The “place” is
 10 identified as the USC campus. FAC ¶¶ 1-2. And the FAC details the nature of
 11 Defendants’ misrepresentations and concealment, “including permitting him to
 12 remain in a position of authority and trust, scheduling patients for gynecological
 13 examinations with him, granting him unfettered and unsupervised access to
 14 patients, holding him out as a trustworthy physician, and failing to disclose the
 15 prior misconduct to patients.” FAC ¶ 57. The preliminary allegations explain the
 16 fraudulent concealment at length. FAC ¶¶ 1-35, 49-59. These allegations are
 17 incorporated by reference into each of Ms. Doe’s claim.

18 As a result of this intentional concealment and the employment of Dr.
 19 Tyndall, Ms. Doe sought medical treatment with Defendants. Ms. Doe had a
 20 confidential, privileged, and/or fiduciary relationship with Defendants and placed
 21 her trust in them. FAC ¶¶ 58, 127-129. The actions and inactions of Defendants
 22 constituted fraudulent concealment, and prevented Ms. Doe, despite her reasonable
 23 diligence, from discovering the conduct alleged in her complaint.

24 Although Defendants contend that Ms. Doe’s claims were not tolled because
 25 Ms. Doe sensed that Dr. Tyndall’s examination was improper, “suspicion of
 26 wrongdoing does not foreclose application of the fraudulent concealment
 27 doctrine.” *Migliori v. Boeing North American, Inc.*, 114 F.Supp.2d 976, 984 (C.D.
 28 Cal. 2000). “[T]he question is not whether a plaintiff was on notice of some

1 wrongdoing. Instead, the question is whether the plaintiff had knowledge of facts,
 2 or should have known about facts, that placed him or her on notice of the specific
 3 cause of action.” *Id.*

4 By concealing their knowledge of Dr. Tyndall’s sexual assaults, Defendants
 5 precluded Ms. Doe from finding the facts that would give notice of her particular
 6 claims. Consequently, the statute of limitations was tolled for Ms. Doe’s claims.

7 **B. Ms. Doe’s inclusion of claims under Civil Code sections 51.9 and 52.4
 8 was inadvertent.**

9 Ms. Doe acknowledges that Civil Code sections 51.9 and 52.4 had not been
 10 enacted at the time of Dr. Tyndall’s assault of her and that these statutes do not
 11 appear to apply retroactively. During the parties’ meet and confer process, Ms. Doe
 12 agreed to dismiss these, and *only* these claims. However, Ms. Doe inadvertently
 13 filed the FAC without removing these claims. As a result, Ms. Doe does not
 14 oppose the dismissal of her third and fifth causes of action.

15 **C. The FAC alleges ample facts to support Ms. Doe’s claims against
 16 Defendants.**

17 ***1. The FAC repeatedly alleges Defendants’ advance knowledge of
 18 Dr. Tyndall’s misconduct.***

19 Defendants contend that “plaintiff nowhere alleges facts supporting her
 20 conclusory contention that USC had any notice of Dr. Tyndall’s conduct.” First,
 21 under Rule 9(b), “malice, intent, knowledge, and other conditions of a person’s
 22 mind” may be alleged generally. Accordingly, a plaintiff need allege only “enough
 23 facts to raise a reasonable expectation that discovery will reveal evidence of” a
 24 defendant’s knowledge or state of mind. *Cafasso, U.S. ex rel. v. General Dynamics
 25 C4 Systems, Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011).

26 Further, the FAC contains repeated and specific allegations regarding
 27 Defendants’ notice, *inter alia*:

28 ///

¶ 56: “All Defendants knew that Dr. Tyndall’s examinations were not proper, appropriate, legitimate, and/or considered within standard of care by any physician of any specialty and/or gynecology or obstetrics ...”

¶ 180: “Defendants, by and through their respective agents, servants and employees, knew or should have known of Dr. Tyndall’s dangerous and exploitive propensities and that Dr. Tyndall was an unfit agent.”

¶ 185: “Defendants were put on notice, knew and/or should have known that Dr. Tyndall had previously engaged and continued to engage in unlawful sexual conduct with student-patients, and had previously and was continuing to commit other felonies, for his own personal sexual gratification ...”

¶ 186: “Defendants were placed on actual or constructive notice that Dr. Tyndall had molested and/or was molesting student-patients during his employment with Defendants. Defendants were informed of molestation, sexual assault, sexual abuse, and/or sexual harassment of patients committed by Dr. Tyndall prior to Plaintiff’s sexual abuse, and of conduct by Dr. Tyndall that would put a reasonable person on notice of such propensity to molest and abuse young female students. Defendants also had knowledge of inappropriate conduct and molestation, sexual assault, sexual abuse, and/or sexual harassment committed by Dr. Tyndall during his employment...”

As a result, Ms. Doe has amply pled Defendants’ notice and knowledge for all claims on which such notice/knowledge are premised.

2. *Title IX: The FAC sufficiently alleges facts supporting actual notice and deliberate indifference.*

A claim under Title IX must allege that the defendant had actual knowledge of the discrimination and failed to adequately respond, i.e., acted with deliberate indifference. *Oden v. Northern Marianas College*, 440 F.3d 1085, 1089 (9th Cir. 2006). Defendants here contend that Ms. Doe fails to plead “actual notice” and “deliberate indifference.” Defendants are incorrect.

Regarding “actual notice,” Ms. Doe explicitly pled that “Defendant USC ... had actual notice that Dr. Tyndall posed a substantial risk of molestation, sexual assault, sexual abuse, and/or sexual harassment to the young female student-patients who sought treatment through Defendant USC’s Student Health Clinic. Specifically, Defendant USC received numerous complaints of Dr. Tyndall’s sexual abuse, yet allowed such sexual abuse to continue unabated.” FAC ¶ 66.

1 Regarding “deliberate indifference,” Ms. Doe explicitly pled that
 2 “Defendants … were deliberately indifferent to the substantial risk of molestation,
 3 sexual assault, sexual abuse, and/or sexual harassment posed to student-patients
 4 who came into contact with Dr. Tyndall After receiving actual notice of
 5 complaints of sexual abuse by Dr. Tyndall, Defendants … ignored the sexual abuse
 6 that Dr. Tyndall inflicted on Ms. Doe and others and allowed him to continue
 7 treating young female students. It was this conduct that constitutes willful
 8 indifference towards Ms. Doe, who was subjected to Dr. Tyndall’s unfettered
 9 sexual misconduct.” FAC ¶ 67.

10 Accordingly, Ms. Doe has sufficiently pled a Title IX claim.

11 **3. *Bane Act: The FAC sufficiently alleges facts that USC interfered***
 12 ***with Ms. Doe’s rights through threat, intimidation, or coercion.***

13 While the terms “threat,” “intimidation,” or “coercion” are not defined in
 14 Civil Code section 52.1, courts have applied their ordinary and common meaning.
 15 See, e.g., *Zamora v. Sacramento Rendering Co.*, 2007 WL 137239, *8, n. 6 (E.D.
 16 Cal. 2007, No. Civ. S-05-00789 DFL KJM) (defining intimidation according to its
 17 ordinary meaning as “to make timid or fearful”); *McCue v. S. Fork Union Elem.*
 18 *Sch.*, 766 F. Supp. 2d 1003, 1011 (E.D. Cal. 2011) (explaining “[f]or the purposes
 19 of the Bane Act, the term ‘threat’ means ‘an ‘expression of an intent to inflict evil,
 20 injury, or damage to another’”). Defendants contend that “None of the acts or
 21 omissions alleged against USC constitute the ‘specified improper means’ the Bane
 22 Act requires.” To the contrary, Ms. Doe alleged that she was sexually assaulted.
 23 FAC ¶¶ 100. These assaults were threatening, intimidating, and/or coercive.

24 Defendants also allege Ms. Doe’s Bane Act claim is deficient because she
 25 did not notify USC of her assault. However, a direct complaint to USC was not
 26 required, because Defendants are vicariously liable for Dr. Tyndall’s acts.

27 *Morrison v. Pal*, No. 117CV00776AWIJLT, 2018 WL 6460038, at *9 (E.D. Cal.
 28 Dec. 10, 2018).

1 **4. Constructive Fraud: The FAC sufficiently alleges that Defendants
2 had notice and intent to deceive.**

3 “The elements for a cause of action for constructive fraud are fiduciary
4 relationship, nondisclosure, reliance, and resulting injury.” *Andrews Farms v.
5 Calcot, Ltd.*, 693 F.Supp.2d 1154, 1166 (E.D. Cal. 2010) (citing *Younan v. Equifax
6 Inc.*, 111 Cal.App.3d 498 (1980)).

7 As addressed in detail above, Ms. Doe repeatedly and sufficiently alleged
8 that Defendants had notice of Dr. Tyndall’s unsuitability. Defendants myopically
9 read the FAC to allege that they received notice of Dr. Tyndall’s misconduct in
10 “the early 2000s,” but these specific allegations do not negate the general
11 allegations that Defendants had notice since the beginning of Dr. Tyndall’s tenure
12 at USC. E.g., FAC ¶¶ 56, 185. Ms. Doe also alleges that, both before and after her
13 examination, Defendants concealed Dr. Tyndall’s propensity to assault patients.
14 FAC ¶¶ 132. Ms. Doe further alleged that the concealment caused her to not only
15 be subjected to Dr. Tyndall’s abuse, but also to continue to act as a student at USC,
16 among other acts in reliance. FAC ¶ 140.

17 Finally, Defendants’ contention that Ms. Doe failed to identify the person
18 who concealed the relevant facts from her is both factually and legally incorrect.
19 First, Ms. Doe repeatedly alleges that Dr. Tyndall concealed his assaults and
20 dangerous propensity. E.g., FAC ¶¶ 55, 139. Second, by its very nature, a claim for
21 fraudulent concealment does not require the same degree of particularity as other
22 fraud claims because that information itself is normally concealed, as it was here.
23 See *Stanwood v. Mary Kay, Inc.*, 941 F. Supp. 2d 1212, 1221 (C.D. Cal. 2012).
24 Further, a plaintiff must be given an opportunity through discovery to identify any
25 unknown defendants who could not be known before the filing of the complaint.
26 *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980).

27 As a result, Ms. Doe has sufficiently alleged a claim for fraudulent
28 concealment.

1 **5. Negligence: Ms. Doe's negligence claims are all supported by**
 2 **sufficient facts.**

3 “The elements of a cause of action for negligence are well established. They
 4 are (a) a legal duty to use care; (b) a breach of such legal duty; and (c) the breach
 5 as the proximate or legal cause of the resulting injury.” *Ladd v. County of San*
 6 *Mateo*, 12 Cal. 4th 913, 917 (1996).

7 Defendants do not specify what element of Ms. Doe’s negligence claims
 8 they challenge. Instead, Defendants contend that Ms. Doe has insufficiently
 9 pledged her claim for negligence because she has supposedly failed to allege that
 10 Defendants knew of Dr. Tyndall’s misconduct.

11 First, as discussed in detail above, Ms. Doe repeatedly and clearly alleges
 12 that Defendants had notice and knowledge of Dr. Tyndall’s unsuitability and prior
 13 abuse of patients.

14 Second, in each negligence claim for negligence, Ms. Doe alleges that
 15 Defendants “knew or should have known” of Dr. Tyndall’s unfitness. FAC ¶¶ 158,
 16 166, 178, 180 (emphasis added). Any claim by Defendants that they did not have
 17 actual knowledge of Dr. Tyndall’s abuse or propensity *supports* Plaintiff’s
 18 negligence claims that Defendants failed to “investigate, supervise or monitor Dr.
 19 Tyndall to ensure the safety of the student-patients in their charge,” institute “a
 20 reasonable system or procedure to investigate, supervise and/or monitor” Dr.
 21 Tyndall, and “adequately investigate, vet, and evaluate individuals for
 22 employment.” FAC ¶¶ 87, 183, 217. Regardless, any such contention is a factual
 23 dispute that is improper at the pleading stage. As a result, Defendants’ argument
 24 lacks merit.

25 **6. Intentional Infliction of Emotional Distress: The FAC sufficiently**
 26 **alleges a claim for IIED.**

27 Defendants again argue that Ms. Doe failed to sufficiently allege that
 28 Defendants knew of Dr. Tyndall’s abuse. As addressed fully above, Ms. Doe

repeatedly alleges that Defendants had notice and knowledge of Dr. Tyndall's unsuitability and prior abuse of patients.

7. UCL: The FAC sufficiently alleges a claim for unfair competition under Business & Professions Code section 17200, et seq.

Under the Unfair Competition Law (“UCL”), “a practice is prohibited as ‘unfair’ or ‘deceptive’ even if it is not ‘unlawful’ or vice versa.” *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 180 (1999) (internal quotes omitted). “Virtually any law can serve as the predicate for a Business and Professions Code § 17200 action; it may be civil or criminal, federal, state or municipal, statutory, regulatory, or court-made. . . It is not necessary that the predicate law provide for private civil enforcement. . . . [Business and Professions Code s]ection 17200 ‘borrows’ violations of other laws and treats them as unlawful practices independently actionable under section 17200 et seq.” *Gafcon, Inc. v. Ponsor & Associates*, 98 Cal.App.4th 1388, 1425 n.15 (2002).

Here, Ms. Doe alleged multiple statutory violations that serve as the predicate for her UCL claim, including Title IX, Education Code section 66270, and Civil Code sections 51, 1708.5, and 1573.

Further, Defendants' argument that common law accrual doctrines, such as delayed discovery and fraudulent concealment tolling, do not apply to UCL claims, is incorrect. *Aryeh v. Canon Business Solutions, Inc.*, 55 Cal.4th 1185, 1196 (2013) (“the UCL is governed by common law accrual rules to the same extent as any other statute”).

D. Ms. Doe's claim for punitive damages is properly pled.

Defendants seek to strike Ms. Doe's claim for punitive damages on the grounds that it is prohibited without a prior court order and should be precluded as a matter of law. However, "Rule 12(f) of the Federal Rules of Civil Procedure does not authorize district courts to strike claims for damages on the ground that such claims are precluded as a matter of law." *Whittlestone, Inc. v. Handi-Craft Co.*, 618

1 F.3d 970, 975 (9th Cir. 2010). See also *Park v. Travelers Commercial Ins. Co.*, No.
 2 CV1401919RGKAGRX, 2014 WL 12597084, at *1 (C.D. Cal., Apr. 21, 2014).

3 Further, motions to strike are generally disfavored and “should not be
 4 granted unless it is clear that the matter to be stricken could have no possible
 5 bearing on the subject matter of the litigation.” *Neveu v. City of Fresno*, 392 F.
 6 Supp. 2d 1159, 1170 (E.D. Cal. 2005). Because Defendants’ motion to strike is
 7 improper under Rule 12(f), it must be denied.

8 Substantively, “[f]ederal district courts have divided on whether [California
 9 Code of Civil Procedure] § 425.13 applies in federal court.” *Estate of Prasad ex
 10 rel. Prasad v. County of Sutter*, 958 F.Supp.2d 1101, 1119 (E.D. Cal. 2013). Under
 11 the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), “federal courts
 12 are to apply state substantive law and federal procedural law.” *Hanna v. Plumer*,
 13 380 U.S. 460, 465 (1965). The weight of published decisions hold that section
 14 425.13 is a procedural state statute and, therefore, does not apply in federal court.
 15 *Id.*; *Jackson v. E. Bay Hosp.*, 980 F. Supp. 1341, 1352 (N.D. Cal. 1997); *Burrows*
 16 *v. Redbud Cnty. Hosp. Dist.*, 188 F.R.D. 356, 361 (N.D. Cal. 1997); *Scalia v.*
 17 *County of Kern*, 308 F.Supp.3d 1064, 1091 (E.D. Cal. 2018).

18 *Jackson* held that section 425.13’s requirement that a party obtain court
 19 approval prior to seeking punitive damages against a health care provider
 20 constitutes, in essence, a “method for managing or directing a plaintiff’s pleadings,
 21 rather than a determination of substantive rights.” 980 F.Supp. 1341, 1352
 22 (N.D.Cal.1997) The *Jackson* court, relying on intermediate California appellate
 23 court rulings that section 425.13 is non-jurisdictional, waivable, and “procedural,”
 24 concluded that section 425.13 “is not ‘a central feature’ of the [California] medical
 25 malpractice scheme.” Accordingly, the *Jackson* court adjudged section 425.13
 26 inapplicable since it is “essentially a method of managing or directing a plaintiff’s
 27 pleadings, rather than a determination of substantive rights.” *Id.*

28 ///

Under *Jackson* and the majority of district court decisions, section 425.13 is a state procedural rule and, therefore, under its requirements, does not apply in federal court. Instead, the Federal Rules of Civil Procedure govern Ms. Doe's state law claim for punitive damages. Under Rule 8(a), a pleading need only contain "a short and plain statement of the claim" and "a demand for the relief sought." Fed.R.Civ.P. 8(a). Consequently, the plain meaning of Rule 8(a)(3) conflicts with section 425.13, making section 425.13 inapplicable in federal court. *Estate of Prasad ex rel. Prasad v. County of Sutter*, 958 F.Supp.2d 1101, 1121 (E.D.Cal. 2013).

As a result, Ms. Doe is not required to obtain permission from the Court when pleading punitive damages under section 425.13 for her state law claims.

E. Should the Court find any merit to Defendants' Motion, Ms. Doe should be freely granted leave to amend.

Rule 15 of the Federal Rules of Civil Procedure mandates that leave to amend "be freely given when justice so requires." Fed.R.Civ.P. 15(a). "This policy is to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir.2003).

Thus, should the Court be inclined to dismiss any of Ms. Doe's claim, she respectfully requests leave to amend.

V. CONCLUSION

For all the foregoing reasons, Ms. Doe respectfully requests that the Court deny Defendants' motion to dismiss and strike Ms. Doe's complaint.

Dated: March 18, 2019

LAW OFFICES OF KEVIN T. BARNES

By: /s/ Kevin T. Barnes
Kevin T. Barnes, Esq.
Gregg Lander, Esq.
Attorneys for Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, the undersigned, am over the age of 18 years and not a party to this action. My business address is 1635 Pontius Avenue, Second Floor, Los Angeles, CA 90025-3361, which is located in Los Angeles County, where the service herein occurred.

On the date of execution hereof, I caused to be served the following attached document:

PLAINTIFF'S OPPOSITION TO DEFENDANTS UNIVERSITY OF SOUTHERN CALIFORNIA'S AND BOARD OF TRUSTEES OF THE UNIVERSITY OF SOUTHERN CALIFORNIA'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM PURSUANT TO F.R.C.P. 12(b)(6), AND TO STRIKE PUNITIVE DAMAGES CLAIMS PER F.R.C.P. 12(f)

on the interested parties in this action, addressed as follows:

Attorneys for Defendants University of
Southern California and Board of Trustees
of the University of Southern California:

Attorneys for Defendant
George Tyndall, M.D.:

Shon Morgan, Esq.
QUINN EMANUEL URQUHART &
SULLIVAN, LLP
865 South Figueroa Street, 10th Floor
Los Angeles, CA 90017-2543
Tel: (213) 624-7707
Fax: (213) 624-0643
ShonMorgan@quinnemanuel.com

N. Denise Taylor, Esq.
Cherie L. Lieureance, Esq.
TAYLOR DEMARCO LLP
1000 Wilshire Boulevard, Suite 600
Los Angeles, CA 90017-2463
Tel.: (213) 687-1600
Fax: (213) 687-1620
DTaylor@taylordemarco.com

Stephen C. Fraser, Esq.
Alexander M. Watson, Esq.
FRASER WATSON & CROUTCH LLP
100 W. Broadway #650
Glendale, CA 91210
Tel: (818) 543-1380
Fax: (818) 543-1389
SFraser@fwcllp.com

Attorneys for Plaintiffs:
Joseph Tojarieh, Esq.
TOJARIEH LAW FIRM, PC
10250 Constellation Blvd., Ste. 100
Los Angeles, CA 90067
Tel: (310) 553-5533
Fax: (310) 553-5536
JFT@tojariehlaw.com

using the following service method:

X VIA ELECTRONIC SERVICE: The above documents were electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the above interested parties.

I DECLARE under penalty of perjury that the foregoing is true and correct.

Executed on **March 18, 2019**, at Los Angeles, California.

/s/ Cindy Rivas
Cindy Rivas